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IN THE

Supreme Court of the United States.

Term, 1934. No.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,
Petitioners,

v.

MARY A. O'BRIEN, COMPLAINANT, AND JOHN HEMPHILL AND J. LOUIS BREITINGER, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $1,742,404.91.
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania and of Robert G. Funkhouser, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Decrees Below.

Your petitioners are the Secretary of Banking of the Commonwealth of Pennsylvania, receiver of Chester County Trust Company, and Robert G. Funkhouser, his deputy receiver.

The decree which your petitioners seek to have this court review is a final decree of the United States Circuit Court of Appeals for the Third Circuit, entered September 28, 1934, affirming the decree of the United States District Court for the Eastern District of Pennsylvania entered August 30, 1933, appointing receivers, the decree of the District Court entered September 22, 1933, changing the designation of the appointees to "temporary receivers", and the decree of the District Court entered October 4, 1933, dismissing the defendants' petition to vacate the appointment of receivers and overruling the defendants' motion to dismiss the bill of complaint. All of these decrees were in a suit entitled and numbered on the docket of the District Court, Mary A. O'Brien v. William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, June Term, 1933, No. 7849. The suit was in equity and sought the appointment of receivers "to take charge of, conserve and administer all of the assets comprising" a mortgage trust fund formerly conducted by Chester County Trust Company and since its closing conducted by the Secretary of Banking of Pennsylvania as receiver of the trust company.

The Secretary of Banking contends that the decree of the District Court and the decree of the Circuit Court of Appeals affirming it are erroneous because (1) they seek to divest the Commonwealth of Pennsylvania of the administration of trust assets assumed before the institution of this proceeding under express statutory authority conferred on its Secretary of Banking and its courts; and (2) the District Court has appointed trustees, in the guise of receivers, in pursuance of a bill which discloses no neces-

sity for a receiver, without waiting for an answer to be filed, without ascertainment of the facts, and without notice to any party in interest except the plaintiff.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the appeal of the Secretary of Banking from the decree of the District Court and the questions for review before this court are:

1. The Secretary of Banking became the receiver of a closed trust company in accordance with express statutory authority and took possession of a mortgage trust fund formerly conducted by it. Pending the delivery of the trust fund to a new trustee appointed by the court of common pleas as directed by the statute, can a Federal court divest the Commonwealth of its possession and control, by the appointment of receivers?

2. When the Secretary of Banking takes possession of the business and property of a bank and files with the court of common pleas a certified copy of his certificate of possession, does he become subject to the jurisdiction of that court as provided by the statute, or must the court enter a formal decree with respect to each asset before it is brought within its jurisdiction?

3. Is the appointment of receivers to wrest possession and control of a mortgage trust fund from the Commonwealth of Pennsylvania, a violation of the Eleventh Amendment to the Constitution of the United States.

4. Did the District Court abuse its discretion by hastily appointing trustees of a mortgage trust fund in the guise

of receivers, upon a bill which shows no need for receivers, without waiting for an answer to be filed to the bill, without ascertaining the facts, and without notice to the parties in interest?

(c) The Statutes Involved.

Challenge of the jurisdiction of the Federal court in this case involves Section 24 of the Judicial Code, as amended (R. S. Secs. 563, 629; 28 U. S. C. A. Sec. 41 (1)).

The right of the Commonwealth of Pennsylvania to control exclusively through its Secretary of Banking and its courts a mortgage trust fund formerly conducted by a trust company now closed, is given by the Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, called The Department of Banking Code. Pertinent sections of this act are set forth at page 35 in the Appendix to the brief.

(d) Statement of Facts.

1. On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, located in West Chester, Chester County, Pennsylvania. He filed a certificate of possession in his office at Harrisburg, and on February 15th filed a certified copy of that certificate in the office of the prothonotary of Chester County who indexed it in the judgment index. All of this was in accordance with the requirements of the Act of June 15, 1923, P. L. 809, known as The Banking Act 1923. (R. 137.)

2. The Secretary of Banking then entered on his duties as a receiver under the jurisdiction of the Court of Common Pleas of Chester County, as provided by The Banking

Act of 1923. Among the "business and property" of which the Secretary took possession was a trust fund, consisting of a group of mortgages held by the trust company as a trustee, against which it had issued participation certificates. The face value of this pool was $1,742,404.91. (R. 138.)

3. On July 3, 1933, the Act of May 15, 1933, P. L. 565, known as The Department of Banking Code became effective, repealing the Banking Act of 1923. This code recited the duties of the Secretary of Banking as a receiver of closed institutions and particularly described his duties and the rights of interested parties with respect to mortgage trust funds or pools. The text of the sections dealing with mortgage trust funds or pools is set forth at page 39 in the Appendix to our brief. This act provides in section 701:

> "Except as otherwise provided in this act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court."

4. The Secretary of Banking in pursuance, first of The Banking Act of 1923, and then of the Department of Banking Code, has conducted the mortgage trust fund from February 14, 1933, when he took possession of the trust company, to the present.

5. On August 28, 1933, a bill was filed in the District Court of the United States for the Eastern District of Pennsylvania, in behalf of Mary A. O'Brien, a citizen of New Jersey, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust

Company". The bill stated that the plaintiff owned an interest in the mortgage trust fund (which interest was about one-fifth of one per cent. thereof). The only complaints were that "little effort is made to secure the collection of interest", that "little effort is being made to compel the payment of taxes", and that unless a receiver is appointed "the interest on said mortgages will continue in default and the taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of the complainant and others holding like certificates". There was no charge of improper conduct or of mismanagement. The bill prayed for the appointment of a receiver of the pool, for an order on the defendants to turn over all the assets and records of the pool to the receiver, and for authority to the receiver to collect mortgage interest, to demand the payment of taxes and to bring suit for the collection of principal. (R. 9.)

6. On August 28 the plaintiff's attorney filed a motion for the appointment of a receiver. (R. 6.) On August 29, 1933, the subpœna was served on the defendants. (R. 7.)

7. On August 30, 1933, one hour after telephone notice to the defendants' counsel, Judge Welsh held a hearing on the motion. He refused to give the defendants' counsel opportunity for further consideration, and upon his offer to submit a brief stated that no brief was necessary. On the same day, without waiting for an answer to be filed, without taking testimony, and without any notice to those interested in the trust fund other than the plaintiff, Judge Welsh appointed two "receivers" of the assets of the trust. (R. 49.) The order directed the receivers "to hold and preserve" all the assets and to "make quarterly reports to this court". It authorized the receivers to collect principal and interest by suit or otherwise, to employ agents

and to pay out money for the preservation of the assets. (R. 15.)

8. On September 1, 1933, the two receivers with two other receivers, named under similar circumstances for another mortgage trust fund of the same trust company, accompanied by two attorneys, appeared at the office maintained by the Secretary of Banking as receiver of the trust company and demanded possession of all assets and records of the trust. Possession was refused by two subordinates then on duty. (R. 49.) The proceedings in the other mortgage trust fund just referred to are the subject of a petition for certiorari now before this Court.

9. On September 2, 1933, the Saturday before Labor Day, Judge Welsh, on petition by his receivers, allowed a rule to show cause why the deputy receiver and his subordinates should not be adjudged in contempt. (R. 24.)

10. On September 4, 1933, on a bill of complaint filed by a mortgage trust fund certificate holder, the Court of Common Pleas of Chester County ordered an injunction to issue restraining your petitioners from delivering any assets or records of the trust fund to any persons appointed receivers by the United States District Court, pending further order from the Court of Common Pleas of Chester County. (R. 32.) This injunction was issued and served on the deputy receiver. (R. 31.)

11. On September 5, 1933, the three persons named in the contempt proceedings appeared before Judge Welsh. There were filed then an answer to the contempt petition (R. 29), a motion to dismiss the bill (43) and a petition to vacate the appointment of the receivers (46). No further steps have been taken in the contempt proceedings.

12. On September 22, 1933, Judge Welsh of his own motion entered a decree amending the former decree so as to make his appointees "temporary receivers" (R. 55) and caused the original decree to be altered by inserting the word "temporary" throughout with pen and ink. (R. 15.)

13. On October 4, 1933, Judge Welsh filed an opinion (R. 66) and a decree (R. 73) dismissing the prayer to vacate and overruling the motion to dismiss.

14. Judge Welsh refused to allow an appeal and a supersedeas (R. 76), and these were allowed by the Circuit Court of Appeals for the Third Circuit (R. 87).

15. On January 4, 1934, the Circuit Court of Appeals heard argument on the appeal. At the argument the owners of $326,250 of certificates filed a petition for leave to intervene and stated their active opposition to a Federal receivership (R. 122). No other certificate holder has been made a party to this proceeding or has appeared in it. On September 28, 1934, the Circuit Court of Appeals filed an opinion (R. 136) and entered an order (R. 149) affirming the decrees of the District Court.

(e) Rulings of the Court Below.

In affirming the decrees of the District Court appointing receivers, later appointing temporary receivers, dismissing the petition to vacate the order appointing receivers and overruling the motion to dismiss the bill, the Circuit Court of Appeals for the Third Circuit ruled:

> (1) That the District Court could appoint temporary receivers of a mortgage trust fund to replace the Secretary of Banking, pending the appointment of a substituted trustee by the Court of Common Pleas.

(2) That the Court of Common Pleas of Chester County had not acquired jurisdiction of all the assets held by the Secretary of Banking as receiver.

(3) That the District Court had not violated the Eleventh Amendment to the Constitution of the United States.

(4) That the District Court had not abused its discretion in appointing the receivers.

B. REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of other circuits the review of which has been refused by this Court. It has not differentiated between receivership proceedings affecting assets of the ordinary business or commercial corporation and those of a quasi-public corporation.

Amos v. Trust Co., of Florida, 54 F. (2d) 286 (1931) C. C. A. Fifth Circuit. Certiorari refused. 285 U. S. 559.

Mitchell v. Lay, 48 F. (2d) 79 (1930) C. C. A. Ninth Circuit. Certiorari refused. 283 U. S. 864.

2. The decision of the Circuit Court of Appeals is opposed to the public policy of the Commonwealth of Pennsylvania and is in direct conflict with the decision of its Supreme Court to the effect that a Federal court has no jurisdiction to appoint receivers to interfere with the liquidation of the business of a quasi-public corporation chartered, supervised and regulated by the state.

Commonwealth v. Penn General Casualty Co., 316 Pa. 1 (1934).

3. The Circuit Court of Appeals has upheld the District Court in making available the remedy of a receivership as a weapon of coercion and a means for the frustration of the public policy of the state as expressed in its statutes and universally followed in every other case in the state:

Shapiro v. Wilgus, 287 U. S. 348 (1932).

4. From the time the Commonwealth of Pennsylvania first established its system for the regulation, supervision and liquidation by the Department of Banking of its banks and building and loan associations until the decision in *Commonwealth of Pennsylvania v. John G. Williams et al., Receivers of Mortgage Building and Loan Association* (certiorari allowed October 22, 1934; October Term, 1934, No. 394) it had been generally understood and believed throughout the Commonwealth that quasi-public institutions chartered by the state were not subject to the equity jurisdiction of the Federal courts. Certainly before the instant case the appointment of Federal receivers for assets in the hands of the Secretary of Banking as the statutory receiver of a closed state trust company was altogether unheard of and not considered to be within the bounds of possibility.

5. The Circuit Court of Appeals has sustained the action of the District Court which attempts to deprive the Commonwealth of Pennsylvania of its sole control of property exercised under state law through its authorized administrative officer and under the supervision of its courts, for months before the bill was filed in the Federal court.

6. The assumption of jurisdiction by the District Court under circumstances plainly showing anxiety on the part of the appointing judge to oust the state officer for the sole

purpose of seating the court's nominees, creates in the Commonwealth of Pennsylvania for the first time an impossible situation. If the decision of the Circuit Court of Appeals is not reversed, no function of the Secretary of Banking exercised by virtue of state law, no asset of a state quasi-public institution entrusted by state law to him or to any other statutory officer, and no trust fund in the hands of such officer or of any private person occupying the position of a fiduciary and accountable to state courts, will be safe from Federal receivership proceedings.

7. The jurisdictional question involved concerns an unnecessary and unjustified interference with the sovereign rights of a state, and is in that respect akin to the questions involved in two other cases in each of which a writ of certiorari has been allowed by this Court.

Commonwealth of Pennsylvania v. John G. Williams et al., October Term, 1934, No. 394.
Gordon, Secretary of Banking, v. Joseph Ominsky et al., October Term, 1934, No. 395.

8. The jurisdictional question is of paramount public importance. It involves a contest between the powers of the Federal court and the powers of a state exercised through its courts, and its Secretary of Banking. In this case each court by affirmative decree has claimed jurisdiction of the property in controversy.

9. Contrary to the express provisions of the Eleventh Amendment, the District Court has construed its power to extend to a proceeding against a state, has interfered with a state officer in the discharge of his statutory duty and has employed contempt proceedings against that officer's subordinates.

10. The District Court judge abused his discretion and violated fundamental principles of equity by appointing trustees, under the guise of "temporary receivers," without allowing an answer to be filed, without ascertaining the facts, without giving notice to the parties in interest, and upon averments plainly insufficient to justify the appointment of receivers.

11. The courts below have decided an important question of general law in a way that is untenable. It is imperative that this Court promptly and finally settle a conflict existing between the jurisdictions asserted by the state and Federal courts. This settlement is necessary in order (a) that there may be effective and unhampered administration of the banking, building and loan association and insurance laws not only of Pennsylvania but of all other states which have set up systems for the governance of corporations subject to similar laws; and (b) that protection may be afforded to every kind of trust, no matter who are the trustees, from those who will seek from the Federal courts the appointment of trustees, under the guise of receivers, but without the safeguards attending the appointment of trustees by the state courts which alone should have jurisdiction over such trusts. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. PRAYER FOR WRIT OF CERTIORARI.

Wherefore your petitioners respectfully pray:

(a) That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the cause therein entitled "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company v. Mary A. O'Brien, Complainant, and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91 Against Which Certificates Were Issued by Chester County Trust Company," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, c. 517 (26 Stat. 826-828), amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 USCA 347).

(b) That such remedy in the premises be decreed as to this Court may seem appropriate and in conformity with said act; that the decrees of the United States Circuit Court of Appeals for the Third Circuit in said cause, and of the District Court of the United States for the Eastern District of Pennsylvania, and each and every part thereof may be reversed by this Court, and said courts below directed to dismiss the bill in equity and to vacate

the decree appointing John Hemphill and J. Louis Breitinger, temporary receivers of the mortgage trust fund or pool formerly conducted by the Chester County Trust Company and now conducted by the Secretary of Banking of the Commonwealth of Pennsylvania.

(c) That this Court may make such further order and direction in the premises as may be in accordance with the law to be applied to the facts in this case.

And your petitioners will ever pray, etc.

WILLIAM D. GORDON,
Secretary of Banking of the Commonwealth of Pennsylvania.

ROBERT G. FUNKHOUSER,
Special Deputy as Agent in Possession of Chester County Trust Company.

WM. A. SCHNADER,
Attorney General,
Commonwealth of Pennsylvania.

HAROLD D. SAYLOR,
Deputy Attorney General.

SHIPPEN LEWIS,
Special Deputy Attorney General.

JOSEPH K. WILLING,
Special Attorney.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

WILLIAM D. GORDON, being first duly sworn, says that he is the Secretary of Banking of the Commonwealth of Pennsylvania, that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein of his own knowledge are true, and the facts stated on information received from others are averred on information received from reliable sources and he verily believes them to be true; and that as Secretary of Banking he is duly authorized to file this petition and apply for a writ of certiorari as therein prayed for.

WILLIAM D. GORDON.

Sworn to and subscribed before me this twenty-third day of November, 1934.

ANNA M. DORNAN,
Notary Public.
My commission expires April 1, 1935.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I. THE OPINIONS OF THE COURTS BELOW.

The opinions of the District Court and of the Circuit Court of Appeals have not been reported.

II. THE JURISDICTION.

(a) The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938; 28 USCA 347) on the ground that the Circuit Court of Appeals has decided an important question of general law in conflict with the decision of the highest court of the Commonwealth of Pennsylvania, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(b) The decree to be reviewed is the decree of the United States Circuit Court of Appeals for the Third Circuit, entered September 28, 1934 (R. 149) affirming the decree of the District Court for the Eastern District of Pennsylvania entered August 30, 1933, appointing receivers (R. 15), the decree entered September 22, 1933, changing the designation of receivers to "temporary receivers" (R. 55), and the decree entered October 4, 1933, dismissing the prayer to vacate the appointment of receivers and overruling the motion to dismiss the bill (R. 73).

(c) The specific claims advanced and rulings made in the lower court were:

(1) The defendants claimed that the District Court cannot appoint receivers of a mortgage trust fund in lieu of the Secretary of Banking pending the appointment of a

substituted trustee by the court of common pleas. The Circuit Court has ruled that the District Court can appoint such receivers.

(2) The defendants claimed that the Court of Common Pleas of Chester County had acquired jurisdiction of all the assets held by the Secretary of Banking as receiver. The Circuit Court has ruled that it had not acquired such jurisdiction.

(3) The defendants claimed that the assumption of jurisdiction and the appointment of receivers by the District Court violated the Eleventh Amendment to the Constitution of the United States. The Circuit Court has ruled that the Eleventh Amendment does not apply.

(4) The defendants claimed that the District Court abused its discretion by the appointment of trustees, in the guise of receivers, without notice or hearing and in pursuance of a bill showing on its face no need for a receivership. The Circuit Court has ruled that there was no abuse of discretion.

III. STATEMENT OF THE CASE.

A full statement of the case has been given in the petition at page 4 under the heading, "Summary Statement of the Matter Involved, (d) Statement of Facts," and in the interest of brevity it is not repeated here.

IV. SPECIFICATION OF ERRORS.

A specification of the errors intended to be argued has been given in the petition at page 3 under the heading "Summary Statement of the Matter Involved, (b) The Questions Presented," and in the interest of brevity it is not repeated here.

V. ARGUMENT.

(a) The Facts.

The Chester County Trust Company, of West Chester, Pennsylvania, acted as trustee for the holders of certificates issued by it against a trust fund of mortgages. On February 14, 1933 the Secretary of Banking took "possession of the business and property" of the trust company and filed with the Court of Common Pleas of Chester County a certified copy of his certificate of possession as required by the statute. (R. 137.)

For over six months the Secretary of Banking conducted the pool preparatory to filing an account and turning over the assets to a trustee to be appointed by the Court of Common Pleas.

On August 28, 1933, a non-resident of Pennsylvania holding certificates giving her an interest of about one-fifth of one per cent. in the mortgage trust fund filed a bill in the United States District Court naming the Secretary of Banking and his deputy receiver as defendants and asking for the appointment of Federal receivers of the trust fund. The sole basis for relief was the averment that "little effort" was being made to collect interest and to compel the payment of taxes *and that* only a receiver could remedy this situation. (R. 9.) On the same day a motion was filed for the appointment of a receiver (R. 6).

The bill and the usual twenty-day subpœna were served the next day (R. 7). The next day, one hour after giving the defendants a telephone notice, the court held a hearing on the motion. On the day of the hearing without giving the defendants' counsel an opportunity to file either an answer or a brief, without hearing testimony and without noti-

fying the beneficiaries of 99 4/5 per cent. of the trust fund, Judge Welsh appointed two receivers of the fund (R. 49). Two days later, without notice to the defendants or to their attorneys, the two receivers, accompanied by two others appointed for another mortgage trust fund under similar circumstances, appeared at the office of the Secretary of Banking in the former quarters of the trust company (twenty-six miles from Philadelphia), and demanded instant surrender of the trust assets. Employees of the defendants refused to comply. (R. 49.)

The next morning, Saturday before Labor Day, without notice to the defendants or to their counsel, who had appeared against the motion to appoint receivers, Judge Welsh allowed a rule on the deputy receiver and on two of his assistants to show cause why they should not be adjudged in contempt. This rule was served by a deputy United States marshal at about noon. It was returnable on Tuesday, the day after Labor Day. (R. 50.) On Labor Day one of the certificate holders other than the complainant procured from the Court of Common Pleas of Chester County an injunction restraining the State receiver from delivering any assets to Federal receivers. (R. 32.) At the hearing on Tuesday the defendants filed an answer in the contempt proceedings (R. 29), a motion to dismiss the bill (R. 43) and a petition to vacate the order appointing the receivers (R. 46).

The court then waited until September 22 to hear argument on the motion and on the petition. He then made an order changing his receivers to temporary receivers (R. 55), and he also caused the word "temporary" to be inserted in pen and ink all through the original decree. A further argument was heard four days later, and finally on October 4 the court refused to dismiss the bill or to vacate the appointment of the receivers (R. 73).

The District Court having refused to allow an appeal to the Circuit Court of Appeals and a supersedeas (R. 76), they were allowed by the Circuit Court of Appeals (R. 87).

The Circuit Court of Appeals heard argument on January 4, 1934. At the argument the owners of $326,250 of certificates filed a petition for leave to intervene and stated their active opposition to a Federal receivership (R. 122). No other certificate holder has been made a party to this proceeding or has appeared in it. On September 28 the Circuit Court of Appeals filed its opinion by Davis, J., affirming the lower court (R. 136). The Secretary of Banking has continued in possession of the trust assets which he has been liquidating since February 14, 1933.

(b) Exclusive Possession and Control of the Mortgage Trust Fund Are in the Commonwealth of Pennsylvania Through Its Secretary of Banking and Its Courts and Cannot Be Interfered With By a United States Court.

Among the "business and property" of the Chester County Trust Company of which the Secretary of Banking has taken possession are the business of conducting a mortgage trust fund and the property rights of the trust company in the compensation payable to it for conducting the trust fund or pool of mortgages.

Six sections of the Department of Banking Code are devoted to the Secretary's duties with regard to mortgage pools of closed institutions. These sections relate also to individual mortgages in which fractional interests have been assigned to several owners.

These sections (quoted in full at pp. 39-46 in the Appendix to this brief) provide that the Secretary shall file an account of the trust with the court of common pleas "as soon as it may be convenient", giving notice to all the bene-

ficial owners; that he may deliver the trust assets to the beneficial owners on their release, if they are sui juris; that any owner may at any time apply to the court of common pleas to appoint a substituted trustee, and that the Secretary shall so apply if no owner has done so within thirty days after the filing of the account. The court is required to conduct a hearing before appointing a trustee. The court may allow compensation for the services of the trust company and of the Secretary.

From these provisions it is plain that the Commonwealth takes entire control of a mortgage trust fund from the moment the receivership begins until the assets have been delivered either to all the beneficial owners on their own receipts, or to a new trustee appointed by the court of common pleas. Of course the provision for delivery to the owners was intended primarily to cover participated mortgages; it would scarcely be possible to apply it in the case of a mortgage trust fund of nearly two million dollars.

Whatever may have been the proper practice under the old act, which was silent as to mortgage trust funds, the Code of 1933, which became effective nearly two months before this bill was filed, states expressly that the Secretary may apply for a substituted trustee only if no application is made by a beneficial owner within thirty days *after the filing of an account.* (See Section 904 of the Code, quoted in full at p. 42 of this brief.) The Circuit Court of Appeals ignores this provision and states that the Secretary was at fault in failing to comply with provisions of the old act relating to trust estates generally. Though the action or inaction of the Secretary in applying for a substituted trustee cannot affect the possession and control exercised by the Commonwealth through its Secretary of Banking and its courts, we wish to point out

clearly that when this bill was filed, the Secretary was doing exactly what the statute then in force told him to do.

These receiverships would clearly be void if they were intended to transfer the commercial assets of the closed trust company from the Secretary of Banking to Federal court receivers. To sustain them would make the state liquidation laws worthless and would permit the Federal court to wrest from a state receiver the assets of any state bank or trust company having a depositor or other creditor living in another state. When the state officer has taken possession as receiver under the state law, the Federal courts must respect the state's authority. Exactly the same considerations apply to a trust fund held by the state receiver by virtue of his office.

In two cases in which petitions for certiorari have recently been granted (*Commonwealth of Pa. v. Williams, et al.*, Oct. Term, 1934, No. 394; *Gordon, Secretary of Banking v. Ominsky, et al.*, Oct. Term 1934, No. 395), the Commonwealth contends that a United States court cannot appoint a receiver for a quasi-public state corporation. The present case is even stronger, for not only did the state officer long ago take possession of the assets of the trust company, but the state law has put him in possession as "receiver" and has subjected him to the jurisdiction of a particular state court.

The principle of comity requires the United States court to respect the possession of the state officer, whether he is a court receiver or an executive officer of the state government. This principle is applied to prevent unseemly struggles between Federal and state authorities for the settlement of which no means is provided except the restraint and good sense of our courts, both Federal and state. Had the Secretary of Banking taken possession in

this case simply as an executive officer, he would nevertheless be protected in his possession by the principle of comity.

A parallel case, decided by the Circuit Court of Appeals for the Third Circuit is *Port Newark National Bank of Newark v. Waldron*, 46 Fed. (2d) 296 (C. C. A. 3d Circuit, 1930). There the "dominion" of the Comptroller of the Currency was sustained against the claim of a receiver appointed by the United States court.

(c) The Court of Common Pleas Has Exclusive Jurisdiction of the Mortgage Trust Fund.

The Circuit Court of Appeals has treated this problem as one of conflict between the Federal and the state courts. We have already shown that it is one of conflict between the power of the Federal court and the power of the Commonwealth of Pennsylvania exercised through its courts and its Secretary of Banking. However, it is essential to discuss the position taken by the Circuit Court of Appeals, for it opens the door to Federal receivership proceedings which can easily make the orderly and equitable liquidation of a state bank impossible.

The state statute requires the Secretary of Banking to file with the prothonotary of the court of common pleas a duplicate of the certificate of possession (Sec. 604, p. 34, of this brief); forbids any court to appoint any receiver other than the Secretary (Sec. 606, p. 37); and makes the Secretary, when he has taken possession, "responsible to the court in which the certificate of possession is filed, and not to any other court." (Sec. 701, p. 37.)

This is plain language. But the Circuit Court of Appeals says that filing the certificate with the prothonotary "is only a notice setting forth that the Secretary has

taken possession of the business and property of the corporation, does not invoke the jurisdiction of the court and asks nothing whatever of it."

The view taken by the Circuit Court leads to great confusion, unless the Supreme Court, in the other cases pending on certiorari, sustains our position that a Federal court cannot appoint receivers of a quasi-public state corporation. If filing the certificate of possession gives the court of common pleas no jurisdiction, that court can obtain jurisdiction only when the Secretary of Banking as receiver specifically invokes it. As the receiver files petitions for leave to sell assets, he will gradually bring those assets within the jurisdiction of the court. Except as he has taken such steps, every asset of a closed bank will lie wide open to Federal receivership proceedings, so that one may readily find the state receiver liquidating half of the assets of a bank while a Federal receiver liquidates the other half. The state receiver can protect himself from this only by filing with the court of common pleas immediately on his appointment, a petition saying, "I am a receiver of the business and property of a bank according to state law. I am afraid of a Federal receivership. I therefore ask you to enter a decree repeating what the statute already says—that I am a receiver subject to your jurisdiction." We take it that the Supreme Court of the United States will not compel the banking authorities of Pennsylvania to resort to such a step as this.

The Circuit Court of Appeals takes the position that the court of common pleas can acquire jurisdiction of the receivership only by the institution of a familiar proceeding, such as the filing of a petition. We submit that a state can give its courts jurisdiction in any way it sees fit. There is no magic in the familiar forms of court proceeding. The

state statute could say, "From the moment the Secretary of Banking takes possession of a bank, he is a receiver of the court of common pleas with no further ceremony." For convenience, the statute requires a certificate of possession to be filed with the prothonotary to mark the inception of the court's jurisdiction. So long as due process of law is respected, a state may give its own courts jurisdiction in any way it pleases.

(d) The Appointment of the Receivers Violated the Eleventh Amendment.

The Eleventh Amendment to the Constitution of the United States is:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The court below has assumed not only that there is diversity of citizenship, but that the defendants are "citizens" of Pennsylvania. It is true that the Chester County Trust Co., is, or was, a Pennsylvania corporation, and that the Secretary of Banking and his deputy, who are named as defendants, are citizens of Pennsylvania, though that is not averred in the bill. But the suit is not against the trust company, nor is it against the defendants as private citizens; it is against the defendants as officers of the Commonwealth. They are named in the bill thus: "Honorable William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Co."

Because the defendants are a receiver and his deputy under the jurisdiction of the court of common pleas of

Chester County, the principle of judicial comity forbids the United States court to appoint receivers of these funds. Because they are officers of the Commonwealth, acting for the Commonwealth in the liquidation of the affairs of the trust company, this suit against them is, in fact, a suit against the Commonwealth.

The defendants sued as state officers have not only been served with process, but one of them has been required to answer a charge of contempt. If Pennsylvania were a small, newly created state, in which the governor performed all the executive and administrative duties, it would be even more apparent that this suit is against the Commonwealth. Recent legislation in South Carolina has actually put certain banks in the "custody" of the governor (*Gibbes v. Zimmerman,* 290 U. S. 326; 78 L. ed. 342; 1933). If the governor himself had been in possession of these trust funds, had been served with process and had been summoned to appear in a contempt proceeding, there would be a plain violation of the state's dignity and a plain infringement of the state's power to liquidate the affairs of its own closed institutions. These suits are as truly against the Commonwealth as if the governor were named as a defendant.

The suits attempt an interference with state power which the Eleventh Amendment forbids. The purpose of the bills is to take from the state the further management of large funds. The Commonwealth of Pennsylvania having undertaken to liquidate the affairs of the trust company, the United States court cannot require the Commonwealth to relinquish part of that liquidation at the instance of a private citizen. Though the Commonwealth permits the fund to be lifted from its officers by appropriate action in its own court, it has not waived its right to the immunity

from Federal process granted it by the Eleventh Amendment. *Smith v. Reeves,* 178 U. S. 436; 44 L. ed. 1140 (1900).

The authorities show that a suit is against a state when it is sought to infringe a constitutional power of the state. In the case at bar it is sought to infringe the state's power to continue in possession of this trust fund until the court of common pleas directs it to be transferred. This is a direct attack upon the state's power to liquidate the affairs of its own trust company.

In suits against state officers, the Eleventh Amendment has been held to be inapplicable (1) where it is sought to prevent state officers from violating the Federal constitution. (*Scott v. Donald,* 165 U. S. 107; 41 L ed. 648; 1897; *Caldwell v. Sioux Falls Stock Yards Co.,* 242 U. S. 559; 61 L. ed. 493; 1917); (2) where the state officers are sued for personal torts. (*McCallum v. United States,* 298 Fed. 373; C. C. A. 9th Circuit, 1924; certiorari denied, 266 U. S. 606; 69 L. ed. 464); and (3) where it is sought to compel the state officers to perform purely ministerial functions. (*Ralston v. Crittenden,* 120 U. S. 390; 30 L. ed. 721; 1887).

Two Circuit Courts of Appeals have allowed preference claims against funds in the hands of a state banking commissioner. *U. S. F. & G. Co. v. Strain,* 292 Fed. 694 (C. C. A. 8th Circuit, 1923; affirmed on another point in 264 U. S. 570; 68 L. ed. 854); *Allen v United States,* 285 Fed 678 (C. C. A. 1st Circuit, 1923).

In each of the cases cited, the United States court said in effect, "When the state court distributes the fund, a certain person shall have a priority claim." Even though there is nothing in those cases to show that a state court had assumed jurisdiction of the fund, there was an interference by the United States court with the orderly procedure of state law, which seems to us clearly a violation of the

Eleventh Amendment. But even if we are wrong in this view, those cases cannot control the question now before the court. To allow a claim against a fund is one thing, but to lift the whole fund bodily from the hands of the state officer and from the control of the state is quite another thing. One is an interference with state powers which may be tolerable; the other is not only a total denial of the state's power, but it is a forcible removal of assets from the state's custody, accompanied in the case at bar by the use of contempt proceedings against the state officers. Brandeis, J., has pointed out the distinction between adjudicating rights in personam and taking "the res out of the possession and control of the state court" (*Lion Bonding and Surety Co. v. Karatz*, 262 U. S. 77, 88; 67 L. ed. 871, 880; 1923).

The Eleventh Amendment forbids these suits because they are direct attacks upon the dignity of the Commonwealth and upon its exercise of constitutional powers.

The following authorities support our view:

Ex parte Ayres, 123 U. S. 443; 31 L. ed. 216 (1887);

Fitts v. McGhee, 172 U. S. 516; 43 L. ed. 535 (1899);

Murray v. Wilson Distilling Co., 213 U. S. 151; 53 L. ed. 742 (1909);

Lankford v. Platte Iron Works Co., 235 U. S. 460; 59 L. ed. 316 (1915);

Missouri v. Fiske, 290 U. S. 18; 78 L. ed. 145 (1933).

In the present case the defendants are parties only because of their official positions. If either of them ceased to hold office his successor in office would have to be substituted.

The defendants are not charged with any act detrimental to the plaintiffs; they are not charged with acting under an unconstitutional statute, nor is it sought to compel them to perform merely a ministerial act required by statute. On the contrary, it is sought to remove from state officers property lawfully in their possession and to make them turn it over to others, contrary to the provisions of the state law.

(e) The District Court Abused Its Discretion by Appointing Trustees in the Guise of Receivers Without Notice to Any Beneficiary and Without Having the Facts Before It.

Even if there were no question of the power of the District Court to take these assets from the control of the Commonwealth, the appointments would be improper. If the appointees are regarded as temporary receivers, they were appointed without any evidence of necessity. If they are regarded as substituted fiduciaries in the guise of receivers, they were appointed without notice to any owner of certificates other than the plaintiff.

Consider the appointment first as an appointment of temporary receivers, as it purports to be. There is nothing on the record to show the necessity which alone justifies a receivership. No testimony was taken, so that the court has acted entirely on the averments of the bill. These averments are merely to the effect that interest and taxes are in arrears in many cases, that "little effort" is being made to compel their payment and that the certificate holders will suffer "irreparable damage" if receivers are not appointed. There is nothing to show bad faith or to show imminent danger to the interests of the certificate holders.

On these averments, without taking testimony, without notifying any other owner, and without waiting for the expiration of the time allowed by law for an answer the court below has prescribed the drastic remedy of receivership.

Every one knows that mortgage interest and principal are hard to collect today. But it does not do to say, "Interest, principal and taxes are not coming in well; therefore I must have a receiver". It must be shown that a receivership is a necessity. Here it cannot be shown that the rights of the parties can be protected only by a receivership; the state law has provided a complete method of protection which appears to be satisfactory to everyone concerned except these two plaintiffs.

The appointees are called receivers. It is plain, however, that the District Court has attempted to appoint in the guise of receivers persons who are intended to act as substituted fiduciaries. The decree signed on August 30th named the appointees as "receivers". On reflection the court below amended this three weeks later to read "temporary receivers". This means that the appointees are to hold temporarily while something else is being done. But what else can be done? The plain purpose of the appointments is to take the assets of the trust fund permanently out of the hands of the state officers and to prevent the court of common pleas from appointing substituted fiduciaries as provided by the state law. Prayer (b) of the bill asks that the receivers be authorized to take the assets "and to hold, manage and operate said mortgage pool" (R. 12). The decrees show that permanent positions are intended, for the appointees are given the powers appropriate to permanent receivers and are required to "make quarterly reports" to the court.

The bill in equity asks for receivers but the court has in effect appointed substituted fiduciaries. The appointment was made not only without asking the overwhelming majority of certificate holders to express their preferences, but with no notice to them of any kind. Such a procedure is entirely foreign to our system of equity jurisprudence.

The plaintiff owns $3700 of the fund involved. The petition to intervene filed with the Circuit Court of Appeals (R. 122) shows that the owners of $326,250 of the fund are actively opposed to a Federal receivership and wish the fund administered under the jurisdiction of the court of common pleas of Chester County. The court below has deemed the minute interest of this plaintiff to be so important as to justify the appointment of receivers without notice to the other owners and without any showing of necessity.

Though we wish the court to decide the important jurisdictional questions which we have discussed, we call the court's attention to the abuses which can attend the exercise of the power which the lower court has assumed.

VI. CONCLUSION.

Your petitioner respectfully submits that the determination by this Court of the questions of law involved in this case is of the utmost importance to all creditors, shareholders and trust beneficiaries of state banks and trust companies.

It is of the gravest consequence that a Federal court be permitted to appoint receivers to wrest from a state the control of a mortgage trust fund which has been asserted and exercised by the state's officer, under the supervision of the state courts, in pursuance of a state statute.

It is of the gravest consequence that the Circuit Court of Appeals has decided that the Commonwealth of Pennsylvania does not, through its Secretary of Banking and its courts, acquire exclusive jurisdiction of all the business and property of a closed bank or trust company in the method expressly provided by the state statute—that is by filing with the prothonotary of the court of common pleas a copy of the Secretary's certificate of possession.

The decision of the Circuit Court of Appeals permits a Federal court to violate the Eleventh Amendment to the Constitution by entertaining a suit which is in fact, though not in name, a suit against a state acting through its officer, and by enforcing the court's decree by contempt proceedings against the state's officer.

The decision of the Circuit Court of Appeals sustains the appointment of substituted trustees in the guise of receivers, without any of the safeguards essential to an equitable proceeding.

Unless this Court corrects the errors of the courts below and protects the states in their exclusive supervision and control of the affairs of closed banks and trust companies, an intolerable condition will arise in which the state authorities and the Federal courts will struggle for control of the liquidation of such institutions, without regard to the principles of comity which have made our dual system successful since the adoption of the Constitution.

It is vital that this Court determine this question of paramount public importance. State systems which provide for the governance of banks and trust companies must be preserved inviolate and be secured in future against unrestricted and unregulated attack by persons, technically nonresident shareholders, but actually mere pawns for professional receivership practitioners.

The petitioners ask this Court to issue its writ of certiorari to the Circuit Court of Appeals, and after a review of the case to reverse the decrees of the courts below, to vacate the appointment of the receivers and to direct that the bill in equity be dismissed.

Respectfully submitted,

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APPENDIX A.

PERTINENT PARTS OF DEPARTMENT OF BANKING CODE, ACT OF MAY 15, 1933, P. L. 565 (effective July 3, 1933).

1. General Provisions.

Section 2. *Definitions.—A.* The following terms shall be construed in this act to have the following meanings, except in those instances where the context clearly indicates otherwise:.

* * * * * *

"Court"—the court of common pleas of the county in which the corporation or person has its principal or only place of business in this Commonwealth; or, where an institution of which the Secretary is receiver is concerned, the particular court in which the certificate of possession, as defined later in this act, is filed.

Section 604. *Certificates of Possession; Filing.—A.* The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy re-

ceiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county in the Commonwealth, or with the proper official in any other state or country, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the institution or title to which is in its name. Such copy shall be recorded in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located.

Section 605. *Injunction to Restrain Secretary.*—Any institution of whose business or property the Secretary has taken possession as receiver, may, at any time within

ten days after the Secretary has become receiver, apply to the court for an order requiring the Secretary to show cause why he should not be enjoined from continuing as receiver. Service may be made in such action by serving the Secretary personally, or by leaving a copy with the deputy in charge of his office in the Department, or by serving the deputy receiver appointed by the Secretary to manage the affairs of such institution. The court shall, after a hearing upon the merits, either dismiss the application or order the Secretary to surrender to the institution possession of its business and property, but no such injunction shall issue where the Secretary has been appointed receiver by action of a court of competent jurisdiction, or by action of the institution itself, in accordance with the provisions of this act.

Section 606. *Power of Courts to Appoint Receivers.*—No court shall appoint anyone but the Secretary as receiver of an institution. Whenever any court, at the instance of a depositor, shareholder, or other person entitled by law to institute such proceedings, shall determine that a receiver should be appointed, for any reason whatsoever, it shall appoint the Secretary as such receiver.

When thus appointed receiver by a court, the Secretary shall serve in the same manner and with the same limitations, and he shall have the same rights, powers, and duties, as when he becomes receiver by operation of law and without appointment by any court. No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisions of this act.

Section 701. *Status of Secretary as Receiver.*—Except as otherwise provided in this act, the Secretary, when he

has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers, and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession of all property to which the institution has title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any power granted to or any duty imposed upon him as receiver of such institution.

The Secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another.

Section 709. *Power of Court to Make and Enforce Orders.*—The court in which the certificate of possession is filed shall sit as a court of equity. It shall have the power, upon petition of the Secretary, to make and enforce

any appropriate order to enable him, with the utmost dispatch, to discharge his duties in connection with the business and property of any institution of which he has taken possession, as receiver, pursuant to the provisions of this act.

The court shall grant to the party against whom the order is sought the right to appear, within ten days after notice is given, to show cause why the order should not be made. The court shall have the power, at the end of the ten-day period, ex parte if the other party does not appear to show cause, or upon the merits, if the party does appear, to issue the aforementioned order.

Note: The Department of Banking Code also provides for the sale of certain property, in some situations with leave of court and in some without leave, for compromises with leave of court, for accounting to the court and for distribution under order of court.

2. MORTGAGE POOL PROVISIONS.

ARTICLE IX.

Secretary in Possession of a Mortgage or Security Pool or of an Asset in Which Undivided Interests Are Held.

Section 901. *Mortgage and Security Pools and Participations; Accounts.*—Whenever the Secretary shall have filed a supplement to the certificate of possession, setting forth his determination to liquidate the affairs of an institution of which he is in possession as receiver, he shall, as soon as it may be convenient, file, in the court in which the certificate of possession shall have been filed, an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by such institution, or as to any mortgage, security, or other asset,

in which undivided interests shall have been created by the institution, regardless of whether certificates of participation in such mortgage or securities pool, or in such mortgage, security, or other asset shall have been actually issued by the institution, and regardless of whether the relation of the institution to the owners of the undivided interests in such mortgage or securities pool, or in any such mortgage, security, or other asset, is technically that of a trustee.

A mortgage or securities pool shall be regarded as having been operated by the institution, regardless of whether any or all of the mortgages, securities, or other assets in such pool shall be held in the name of the institution or in the name of a nominee of the institution. Where undivided interests have been created in any mortgage, security, or other asset by any corporation or person holding such mortgage, security, or other asset as nominee of the institution, such undivided interests shall be regarded as having been created by the institution.

The prothonotary shall not be under any duty to recopy or otherwise record any such account filed by the Secretary. He shall make no charge except the regular fee for filing such or similar papers.

Section 902. *Transfer of Pools and Participations without Filing an Account.*—If all the corporations or persons who are the owners of all the undivided interests in any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they

shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undivided interest in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from anyone in behalf of such unborn beneficiaries or other persons who are not sui juris.

Section 903. *Notice of Filing Account.—A.* Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in

which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this section, at their addresses as they appear on the books or other records of the institution, or, if the address of any such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court.

Section 904. *Appointment of Substituted Fiduciary; Transfer of Pools or Participations upon Order of Court.* —*A.* After the filing by the Secretary of a supplement to the certificate of possession, setting forth his determina-

tion to liquidate the business and property of an institution, but either before or after the filing of an account by him as to any mortgages, securities, or other assets comprising any mortgage or securities pool, operated by such institution, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the owner of any undivided interest in such mortgage or securities pool, or in such mortgage, security, or other asset, may file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created.

If such petition shall not have been filed by the owner of any such undivided interest within thirty days after the notice by the Secretary of the filing of an account as to such mortgage or security pool, or as to such mortgage, security, or other asset, the Secretary shall file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for any such mortgage, security, or other asset in which undivided interests were created by the institution.

Upon the filing of such a petition by the owner of any such undivided interest, or by the Secretary for such mortgage or security pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, the court shall, upon a day fixed by it, conduct a hearing upon such application, after which it shall appoint a substituted fiduciary.

B. The Secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securi-

ties, or other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and, in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the Secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account.

Section 905. *Advances by Secretary to Substituted Fiduciary.*—Whenever the Secretary shall have filed an account as to any such mortgage or securities pool, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, and it shall appear to the court that any sum of cash will be needed by the substituted fiduciary for the protection of the owners of undivided interests in such mortgage or securities pools, or in any such mortgage, security, or other asset, as to which such account shall have been filed, and if it shall appear from the account that the Secretary does not have any cash held by him in connection with such mortgage or securities pool, or in connection with any such mortgage, security, or other asset, or if the account discloses that the cash in his hands for that purpose is insufficient for the protection of the owners of the undivided

interests in such mortgage or securities pool, or any such mortgage or security, or other asset, or where no account is filed, if the Secretary shall demonstrate these facts to the satisfaction of the court, the court may, upon petition of the Secretary, and in the exercise of its discretion, order the Secretary to advance to the substituted fiduciary, out of the general assets of the institution, such cash as may be necessary for the protection of the owners of such undivided interest. Such order shall provide that the amount of cash so advanced by the Secretary shall be repaid by the substituted fiduciary out of the first moneys realized by such substituted fiduciary on the mortgages, securities, and other assets transferred to him.

Section 906. *Compensation and Expenses.*—The court, in its adjudication of any account filed by the Secretary as to any mortgage or securities pool operated by an institution of which the Secretary is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, shall award to the Secretary such compensation for services rendered and expenses properly incurred by the institution, or by the Secretary, as the court shall deem reasonable and proper under all the circumstances. The order of the court making any such award to the Secretary shall provide for the payment of such compensation or expenses out of any cash included in the account, or if there be no cash in the account, or if the amount of cash included therein is insufficient to pay the amount awarded to the Secretary, the order shall provide for the payment of such compensation or expenses out of the first moneys realized by the substituted fiduciary on the mortgages, securities, or other assets so transferred to such substituted fiduciary.

All sums received by the Secretary under this section shall become assets of the institution of which he is in possession as receiver.

When the court shall, pursuant to the provisions of this act, order the Secretary to transfer such mortgages, securities, or other assets, prior to the filing of an account, it shall similarly make provision for the payment of the compensation earned, or the expenses incurred, by the institution, or by the Secretary.